MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

Volume 8, Number1 - FALL 1997

IN THIS ISSUE

TO OUR READERS:

We are pleased to introduce our new Editor-in-Chief, Henry Maurer, who was appointed as Director of Merit System Practices and Labor Relations in November, 1996. An employee of the Department of Personnel since 1984, his responsibilities have included reviewing appeals, coordinating rulemaking activities, serving as legislative liaison, and supervising compliance and enforcement matters.

Mr. Maurer graduated from the City College of New York. He earned his Master's degree in Political Science from the University of Pennsylvania and his Juris Doctor degree from Temple University. He was admitted to the Bar in New Jersey and Pennsylvania in 1980.

At this time, it is also a pleasure to highlight our two most recently appointed Merit System Board members. Julius J. Mastro, Ph.D., is a Political Science Professor Emeritus and a trustee at Drew University. Dr. Mastro's term expires on March 23, 1998. Edward M. Verner, M.D., has a medical practice in Newark and is President of the Newark/North Jersey Black Churchmen. Dr. Verner's term expires on March 23, 1999.

Since we are commencing Volume 8, we are enclosing with this issue the new Cumulative Index for Volumes 1 through 7.

NEW JERSEY DEPARTMENT OF PERSONNEL

Christine Todd Whitman
Governor

Shaping a quality work force through competence, caring and commitment

Linda M. Anselmini
Commissioner

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WRITTEN RECORD APPEALS

Lack of Good Moral Character Warrants Removal from Public Safety Eligible List

In the Matter of Kelvin Alfred, Fire Fighter, Newark

(Merit System Board, decided Feb. 11, 1997)

Kelvin Alfred, represented by Paul W. Bergrin, Esq., appeals the decision of the Division of Human Resource Information Systems (HRIS), which found that the appointing authority had presented a sufficient basis to remove Mr. Alfred's name from the Fire Fighter (M9050N), Newark eligible list.

The announcement for Fire Fighter (M9050N), Newark stated that eligibles must be residents of Newark as of June 15, 1991, the closing date for the subject examination. Subsequent to the issuance of the announcement, the City of Newark adopted an ordinance requiring that all Fire Department applicants maintain Newark residency on a continuing basis from the closing date up to and including the date of appointment. The continuous residency ordinance was adopted on July 6, 1994 and made retroactive to June 7, 1993. On April 13, 1995, approximately one year and ten months from the effective date of the ordinance, the Department of Personnel certified appellant's name to the appointing authority to be considered for appointment. Because appellant's name was certified for appointment subsequent to the effective date of the ordinance, appellant was required to have continuously resided in Newark from the closing date up to and including the date of appointment.

In disposing of the certification, the appointing authority requested that appellant's name be removed on the basis that he did not maintain continuous residency in the City of Newark and on the basis that he falsified his application. In support of its request, the appointing authority submitted: (1) a NJ Driver's License Abstract dated September 19, 1994; (2) a NJ Motor Vehicle Registration; and (3) a State Farm Insurance Card effective July 15, 1994, listing Mr. Alfred's address as 2350 Route 10, Unit A, Morris Plains. It explained that on his application booklet C, page C-4, Mr. Alfred listed 87 Grand Avenue, Newark, as his address. Appellant submitted that he was a resident of 87 Grand Avenue, Newark; and provided an affidavit attesting to his residency; a letter from a Member of Congress; a voter identification registration form; tax records from 1987 through 1994; applications for employment; a vehicle registration for the period of June 1995 through June 1996; a vehicle insurance identification card for the period of July 11, 1995 through January 11, 1996; an insurance declaration covering the period of April 1, 1995 through April 1, 1996; and his birth certificate.

HRIS noted that the Fire Fighter (M9050N), Newark announcement stated that eligibles must be residents as of the closing date, June 15, 1991. It explained that subsequent to the announcement, a City of Newark Ordinance established a continuous residency requirement for Fire Department applicants, adopted July 6, 1994 and made retroactive to June 7, 1993. Since Mr. Alfred's name was certified after the retroactive effective date of the City of Newark ordinance, the continuous residency requirement for the Newark Fire Department applied. Thus, HRIS removed appellant's name from the list based on his failure to meet the continuous residency requirement.

On appeal to the Merit System Board, appellant alleges that he attempted to lower his automobile insurance rates by using a Morris Plains address on his driving privilege documents. Appellant submits numerous documents and affidavits in support of his position that he has resided at 87 Grand Avenue in Newark for his entire life. Among the pertinent documents showing his address as 87 Grand Avenue, Newark, he presents tax returns from 1987 through 1994, and 14 affidavits from individuals who know appellant and who state that he has resided at 87 Grand Avenue for a number of years.

Findings of Fact

Upon independent review and careful consideration of all material presented, the Board made the following findings:

1. Since appellant's name was certified on April 13, 1995, he was required to meet the continuous residency requirement from the closing date of the subject examination, June 15, 1991, to the date of his appointment.

2. In disposing of the certification, the appointing authority requested that appellant's name be removed on the basis that he did not

maintain a continuous residency in the City of Newark and on the basis that he falsified his application.

3. Appellant listed on his employment application that this address was 87 Grand Avenue, Newark as of the closing date.

4. The appointing authority submitted three documents related to appellant's driving privileges which listed appellant's address as 2350 Route 10, Unit A, Morris Plains as of July 15, 1994.

5. Appellant submitted tax returns from 1987 through 1994, and 14 affidavits which substantiate his residency as 87 Grand Avenue, Newark from the closing date to the certification date.

6. Appellant submitted false information to the NJ Division of Motor Vehicle Services and an insurance company in an attempt to lower his automobile insurance rates by using an out-of-town address.

Conclusion

N.J.A.C. 4A:4-6.1(a)9 allows the Board to remove an eligible's name from an eligible list for sufficient reasons beyond those enumerated in *N.J.A.C.* 4A:4-6.1(a)1-8. Removal for such sufficient reasons includes, a consideration that based on the eligible's background and recognizing the nature of the position at issue, a person should not be eligible for appointment. In this regard, it is recognized that a Fire Fighter occupies a highly visible and sensitive position within the community and the standard for an appointee includes a good character and utmost confidence and trust. *N.J.S.A.* 40A:14-9 provides, in pertinent part, that except as otherwise provided by law, no person shall be appointed as a member of a paid, or as a paid member of a part-paid fire department and force, unless the person is of good moral character. The appointing authority submitted three documents related to appellant's driving privileges which listed appellant's address as 2350 Route 10, Unit A, Morris Plains as of July 15, 1994. Appellant submitted tax returns and 14 affidavits from individuals known to him who verify that appellant resided at 87 Grand Avenue, Newark from the closing date to the present time. Appellant also explains that he attempted to lower his automobile insurance liability by using an out-of-town address. Specifically, appellant submitted false information to the NJ Division of Motor Vehicle Services and an insurance company. These actions do not reflect good moral character. Thus, although Mr. Alfred's name cannot be removed on the basis of continuous residency requirements, his actions concerning deception to lower his insurance rates provide a sufficient basis in the record to remove appellant's name from the subject eligible list. Additionally, the Board is referring this information to the NJ Division of Motor Vehicles Services and appellant's insurance company.

Order

Therefore, it is ordered that this appeal be denied.

Sufficient Basis Presented to Expand Title Scope for Examination

In the Matter of Police Chief, Middletown Township

(Commissioner of Personnel, decided March 26, 1997)

The Middletown Township appointing authority requests relaxation of the pertinent provisions of *N.J.A.C.* 4A:4-2.4 (Promotional title scope: local service) in order to open the promotional title scope for Police Chief to the titles of Police Captain and Police Lieutenant.

N.J.A.C. 4A:4-2.4(a) states, if a title which is the subject of a promotional examination is part of a title series, then the examination shall be open to one of the following:

1. The next lower or next two lower in-series titles; or

2. All applicants in the unit scope who meet the open competitive requirements and all applicants in the next lower or next two lower in-series titles.

Subsection (b) of that rule provides that the title scope described in (a)2 above may be used when the appointing authority requests a wider title scope

or provisionally promotes an employee who does not have permanent status in an in-series title.

Finally, subsection (e) states that in extraordinary circumstances, the Commissioner may set another appropriate title scope.

This title series includes: Police Chief, Deputy Police Chief, Police Captain, Police Lieutenant, Police Sergeant and Police Officer. The rule applies to this series regardless of whether the jurisdiction uses all of the titles in the series.

In the instant matter, the Police Chief and Deputy Police Chief positions are vacant in Middletown Township and the appointing authority seeks to announce promotional examinations for both titles. It also seeks a title scope for the Police Chief announcement which would include the Police Captain and Police Lieutenant titles eligible to compete for the Deputy Police Chief test. However, in accordance with the rule, a request to expand the scope of eligibility beyond the next two lower in-series titles of Deputy Police Chief and Police Captain would also include uniformed personnel meeting the open competitive requirements who would be ineligible for the Deputy Police Chief examination. Under these circumstances, the appointing authority requests a relaxation of *N.J.A.C.* 4A:4-2.4 in order to broaden the title scope for Police Chief to include eligibles in the Police Lieutenant title so that the Police Chief title scope is consistent with that for the Deputy Police Chief promotional examination. The Assistant Commissioner, State and Local Operations, concurs with this request.

Conclusion

The record establishes that the positions of Police Chief and Deputy Police Chief are vacant and that the appointing authority seeks to have the titles of Police Captain and Police Lieutenant included in the scope of eligibility for examinations for both titles. Under these particular circumstances, utilization of the provisions of *N.J.A.C.* 4A:4-2.4(e) to set a title scope for the Police Chief examination which is consistent with the Deputy Police Chief examination is appropriate.

Order

Therefore, it is ordered that this request be granted and that the title scope for Police Chief, Middletown Township include the titles of Deputy Police Chief, Police Captain and Police Lieutenant.

Age Discrimination Not Established in Scoring of Unassembled Examination

In the Matter of John P. Gerolstein, Supervising Family Service Specialist 2 and Family Service Specialist 2, Division of Youth and Family Services, NJ Department of Human Services

(Commissioner of Personnel, decided October 24, 1996)

John P. Gerolstein appeals the decision of the Supervisor, Selection Appeals Unit, which found that his examinations for Supervising Family Service Specialist 2 (PS0614K) and Family Service Specialist 2 (PS0877K), Division of Youth and Family Services (DYFS), NJ Department of Human Services, were properly scored. It is noted that appellant successfully completed the subject examinations and was ranked number 59 and 61, respectively, on the resultant lists which were issued March 15, 1995 and June 7, 1995.

The examinations at issue were processed as reviews of education and experience. On appeal, appellant argued that his experience was not assessed accurately in that no credit was given for experience gained more than 10 years prior to the examination. Appellant contended that this procedure affects only older employees and therefore constitutes a form of age discrimination. Appellant further argued that the limit on experience is not consistent with the evaluation of education which may have been gained more than 10 years prior to the test.

The Supervisor provided a detailed analysis of the scoring criteria, and explained that the 10-year cutoff is predicated on the premise that recent experience is more indicative of current technology and procedures than experience gained prior to the 10-year cutoff, and that this procedure has been affirmed by the Merit System Board (MSB) as a valid method of ranking eligible applicants according to their current skills and knowledge of a subject area.

On appeal to the Commissioner of Personnel, appellant essentially reiterates his prior arguments, and contends that his job responsibilities from 1977 through 1983 were basically the same as

his responsibilities dating from January 1994. Appellant additionally asserts that the current technology and procedures are the same as they were 10 years ago. Appellant further mentions that he has filed a complaint with the NJ Division on Civil Rights alleging age discrimination.

Conclusion

Appellant contends that his scores on the subject examinations are inaccurate because no credit was awarded for his experience from 1977 through 1983 based on a procedure where no credit is given for experience gained more than 10 years prior to the examination. In this regard, the Department relies on *IMO Peter A. Smith,* (MSB decided April 23, 1984), which found that ". . . there are sound reasons for limiting the evaluation to experience gained within the past 10 years since rapid changes in certain fields make recent experience a more valid indicator of current knowledge than experience gained many years ago." Additionally, in *Peter A. Smith*, the MSB noted that because the appellant had failed to show that the 10-year cut-off had an adverse effect on applicants over the age of 40, he had failed to present a prima facie case of discrimination by reason of disparate impact. *See Massarsky v. General Motors Corp.*, 704 *F.2d* 111 (3rd Cir. 1983) and *Thomas v. Sanborn's Motor Express, Inc.*, 154 *N.J. Super*. 555 (App. Div. 1977).

A review of Department of Personnel records in the instant matter indicates that there was no apparent adverse effect on applicants over the age of 40. One hundred eighteen applicants were admitted to the examination for Family Service Specialist 2 (PS0877K). Three of the five applicants who were tied at rank number 1 were age 40 or older, as were all three applicants who were placed in the next two ranks, numbers 6 and 8. Of the 13 applicants who tied for rank number 9, eight were 40 years old or older. Ninety-two applicants were admitted to the examination for Supervising Family Service Specialist 2 (PS0614K). For this examination, the applicant ranked number 1 was younger than 40; however, all 10 applicants placed in ranks 2 through 12 were older than 40. Of the 15 applicants who were tied for rank number 13, 11 were 40 years old or older.

A thorough review of the record indicates that the decision of the Supervisor, Selection Appeals Unit is amply supported by the record, and appellant provides no basis to disturb that decision. Thus, appellant has failed to support his burden of proof in this matter.

Order

Therefore, it is ordered that this appeal be denied.

Disqualification Due to Positive Drug Test Upheld

In the Matter of Wallace Williams, Juvenile Detention Officer, Essex County

(Merit System Board, decided July 22, 1997)

Wallace Williams appeals the request by Essex County to remove his name from the Juvenile Detention Officer (C3803N) eligible list for medical unfitness to effectively perform the duties of the position.

The appointing authority rejected Mr. Williams, the number 68 non-veteran eligible on the eligible list, for appointment to the position of Juvenile Detention Officer, based on a report stating that the appellant was disqualified due to a positive drug test for cocaine and methadone.

In support of its rejection and request for removal, the appointing authority submitted laboratory reports dated March 13, 1995 for sample collection, stating that an initial screening of the appellant's urine sample utilizing the Emit-Assay method was conducted and proved positive for cocaine and methadone. This positive test result was confirmed by a report from the National Health Laboratories in Cranford, New Jersey, after retesting the original urine specimen using the gas chromatography/mass spectrometry method.

The appellant submits that, when he found out that he had tested positive, he underwent another drug test on March 23, 1995 at the New Jersey Medical School in Newark, New Jersey. The drug test results were negative but he does not

submit any explanation as to why he tested positive 10 days earlier. Appellant also maintains that he does not "do" drugs. He states that he took Robitussin DM, castor oil and Tylenol when he underwent the first drug screen but he does not establish that such drugs would cause the positive drug results. He further states that he has planned a career in law enforcement and he knows about the illegal use of drugs.

N.J.A.C. 4A:4-4.7(a)1 and 4A:4-6.1(a)3 state that an eligible who is physically unfit to effectively perform the duties of the position may be removed from the eligible list. *N.J.A.C.* 4A:4-4.7(a)1 and 4A:4-6.1(a)9 also state that an eligible may be removed from an eligible list for other sufficient reasons as determined by the Merit System Board.

Findings of Fact

Upon independent review and careful consideration of all material presented, the Board made the following findings:

1. The appointing authority rejected and requested removal of the appellant from the Juvenile Detention Officer eligible list as medically unfit to effectively perform the duties of the position because of a positive drug test.

2. The medical documentation submitted by the appointing authority provides sufficient cause to remove appellant from the Juvenile Detention Officer eligible list when consideration is given to the nature of the duties of the position.

3. The appellant did not submit any medical documentation to effectively refute the position of Essex County.

Conclusion

The appointing authority has met its burden of proof that appellant had a positive drug screen and that such matter would prevent him from effectively performing the duties of the position at issue. He thus does not meet the required physical qualifications for the Juvenile Detention Officer title. The job specification for Juvenile Detention Officer defines the duties of the position as tracking the number of residents, transporting juvenile residents outside the institution, escorting the juveniles to and from their quarters, patrolling assigned areas of the building and grounds, making required reports, and assisting in controlling the general conduct and behavior of juveniles. Clearly, a positive drug test presents an impediment to appellant's ability to perform these duties.

The appellant contends that he tested negative on March 23, 1995. However, he does not explain why he tested positive for illegal drugs 10 days earlier. Since the presence of cocaine metabolites generally remains in the human body's system for up to four days, a drug test conducted after this time does not rebut the subject positive test result. *See Employee Drug Screening and Detection of Drug Use By Urinalysis,* U.S. Department of Health and Human Services, 1988. Thus, appellant fails to provide an alternate basis for the positive drug screen at issue.

Order

Therefore, it is ordered that the appeal be denied and the name of Wallace Williams be removed from the eligible list for Juvenile Detention Officer (C3803N).

Alternate Basis for Positive Drug Test Warrants Restoration to List

In the Matter of Sean Link, County Correction Officer, Middlesex County

(Merit System Board, decided Feb. 11, 1997)

Sean Link, represented by Frank E. Tournour, Esq. appeals the request by Middlesex County to remove his name from the County Correction Officer (C6342S) eligible list for medical unfitness to effectively perform the duties of the position.

The appointing authority rejected Mr. Link, the number 16 non-veteran eligible on the eligible list for appointment to the position of County Correction Officer, based on a report stating that the appellant was disqualified due to a positive drug

test for two illegal drugs.

In support of its request for removal, the appointing authority submitted laboratory reports, dated May 10, 1995, stating that an initial screening of the appellant's urine sample utilizing the Emit-Assay method was conducted and proved positive for morphine and codeine. This positive test result was confirmed by a report from the National Health Laboratories in Cranford, New Jersey, after retesting the original urine specimen using the gas chromatography/mass spectrometry method.

Appellant submits a letter from Dr. Marc Mayer, Clinical Assistant Professor, University of Medicine and Dentistry of New Jersey. Dr. Mayer indicates appellant was taking Tylenol #3, which is an analgesic containing codeine as treatment for a groin pull sustained on May 1, 1995. Dr. Mayer indicates that the positive drug screen on May 10, 1995 was entirely consistent with the drug properties of the medication that he prescribed. Moreover, Dr. Mayer indicates that appellant underwent another drug test on July 17, 1995. The drug test results were negative. Dr. Mayer indicates that he has known and treated appellant for a number of years. He states that appellant has shown no evidence that he ever used illegal drugs.

A Middlesex County Department of Corrections Sergeant indicated that appellant had the opportunity to declare prescription drugs taken thirty (30) days prior to the subject drug test; however, he concedes that appellant would not have had to declare over-the-counter drugs, such as Tylenol, Motrin or Advil. The Sergeant further maintains that, at no time, did appellant indicate that he was taking Tylenol with codeine. Appellant alleges that, when filling out the Continuity of Evidence Form, he was advised that it was unnecessary to record that he was taking Tylenol.

N.J.A.C. 4A:4-4.7(a)1 and 4A:4-6.1(a)3 state that an eligible who is physically unfit to effectively perform the duties of the position may be removed from the eligible list. *N.J.A.C.* 4A:4-4.7(a)1 and 4A:4-6.1(a)9 also state that an eligible may be removed from an eligible list for other sufficient reasons as determined by the Merit System Board.

Findings of Fact

Upon independent review and careful consideration of all material presented, the Board made the following findings:

1. The appointing authority requested removal of the appellant from the County Correction Officer (C6342S) eligible list as medically unfit to effectively perform the duties of the position because of a positive drug test.

2. Appellant provides medical documentation that he was taking a prescription medication that contained the substances for which he tested positive.

3. The medical documentation submitted presents an alternate basis for the positive drug screen.

Conclusion

The medical documentation indicates that appellant had taken Tylenol #3 with codeine, a prescription for pain relief, for an injury sustained on May 1, 1995. His treating physician, Dr. Mayer, indicates that appellant had been taking such medication at the time that the drug test was administered on May 10, 1995. Accordingly, there is medical evidence to substantiate appellant's contention that the positive result could have been caused by the prescription medication. Moreover, appellant tested free of drugs on July 17, 1995 when he was no longer using the prescription drug. In addition, Dr. Mayer indicated that he has treated appellant for several years and he has had no occasion to believe appellant was ever under the influence of illegal drugs. Although the appointing authority claims that appellant did not indicate that he was taking Tylenol with codeine, the medical facts indicate that he, in fact, was taking such medication which provided an alternate basis for the positive drug result.

Order

The Merit System Board finds that the appointing authority has not met its burden of proof that appellant is medically unfit to perform effectively the duties of a County Correction Officer; and, therefore, the Board orders that his name be restored to the subject eligible list. Absent any disqualification issue ascertained through an updated background check, such as criminal conviction or other compelling reason, the appellant's appointment is otherwise mandated. A federal law, the Americans With Disabilities Act (ADA), 42 *U.S.C.* Sec. 12101 *et seq*., expressly requires that a job offer be made before any individual is required to

submit to a medical or psychological examination. That offer having been made, it is clear that, absent the erroneous disqualification, the aggrieved individual would have been employed in the position.

HEARING MATTERS

N.J.A.C. 4A:8-2.6 provides that a permanent employee, or employee serving a working test period, who is adversely affected by a layoff action, may file an appeal with the Merit System Board challenging the good faith of the layoff on the basis that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons. Such appeals are subject to hearing and final administrative determination by the Merit System Board. On appeal, the employee has the burden of proof and must establish that the layoff action was in bad faith.

The first three decisions address whether, under the particular circumstances presented, the appointing authorities at issue acted in bad faith.

Additionally, we have included for your benefit, a recent Merit System Board decision involving the applicability of the 45 day timeframe set forth at *N.J.S.A.* 40A:14-106a to County Correction Officers.

Political Animus Not Established in Bad Faith Layoff Challenge

In the Matter of City of Elizabeth Layoffs **(Merit System Board, decided June 10, 1997)**

Appellants, Thomas Verdon (Loan Advisor), Joseph Faccone (Chief Sanitary Inspector, Industrial Hygiene/Air Pollution Control), Randy Moscaritolo (Senior Sanitary Inspector), and Joan LaBracio (Clerk Typist) were laid off or demoted from their respective titles with the City of Elizabeth, effective January 12, 1995. Each appealed the good faith of his/her layoff on the basis that it had been motivated by reasons other than economy or efficiency. Specifically, each maintained that he/she had been targeted for layoff by the City of Elizabeth's Mayor, Christian Bollwage, due to his/her affiliation with the City's prior Mayor of 28 years, Thomas Dunn. Mr. Bollwage assumed the duties of Mayor on January 1, 1993.

As to the specific nature of appellants' affiliation with former Mayor Dunn, at the hearing before the Office of Administrative Law (OAL), Thomas Verdon testified that he had signed a petition in July, 1993 to modify the City's partisan primary to a nonpartisan election. Mr. Verdon explained that in August 1993, he received a telephone call from Edward J. Sisk, the City's Fire Department Director, inquiring as to whether he had signed the petition. In his testimony before the OAL, Mr. Sisk explained that the purpose of his call was simply to verify the authenticity of Mr. Verdon's signature on the petition.

Mr. Verdon also testified that following the 1992 mayoral election, Mayor Bollwage visited his home. According to Mr. Verdon, he told Mr. Bollwage during the visit that he had inherited one of the best run cities in New Jersey, to which Mr. Bollwage responded only with a "stony silence and a stony stare." Mr. Verdon also recalled that he had been asked to sponsor an event for Mr. Bollwage during Mr. Bollwage's campaign for Mayor; however, he declined the offer, instead expressing his support for then Mayor Dunn.

Mr. Faccone testified that he openly supported Mayor Dunn's 1992 campaign, attending and arranging political fundraisers and working at

Dunn headquarters making telephone calls and distributing campaign literature, adding that prior to the 1992 primary election, he displayed a sign on his lawn which indicated his support for then Mayor Dunn in the upcoming election. Mr. Faccone maintained that Mr. Bollwage observed this sign during a visit to his home.

Mr. Faccone testified that he was explicitly asked for whom he would be voting in the upcoming election by a representative of the Bollwage campaign; however, he refused to divulge that information. Mr. Faccone also spoke of a meeting between himself and Mr. Bollwage during which he requested of Mr. Bollwage that his job be spared on the basis that he was only 20 months away from retirement. Mr. Bollwage responded to Mr. Faccone that he was not involved in the layoffs and directed Mr. Faccone to the City's Business Administrator. Upon further questioning before the OAL, Mr. Faccone conceded that the City employs a Chief Licensing Inspector, whose duties overlap those of his former position.

Although Ms. LaBracio's permanent title was that of Clerk Typist, she also served with the City as Secretary to the Insurance Commissioner and as Insurance Manager. Ms. LaBracio testified before the OAL that she too had worked on former Mayor Dunn's campaigns over the years, helping with mailings, answering telephones and fundraising. However, Lorraine Dumke, Executive Assistant to the Business Administrator, testified that due to the implementation of a computerized purchasing system, it was determined that Ms. LaBracio's position could be eliminated. Moreover, Ms. LaBracio conceded the following: 1) that she lived in Rahway and, therefore, she was ineligible to vote in Elizabeth; 2) that her appointment as Secretary to the Insurance Commissioner was in the unclassified service; 3) that she was appointed to that position by the Commissioner; and 4) that she served in that position at the pleasure of the Commissioner. Additionally, Ms. LaBracio admitted that the Insurance Commissioner had both an outside insurance advisor and an outside insurance administrator.

Mr. Moscaritolo testified that he acted as a Dunn poll challenger during the 1992 election. He stated that Mr. Bollwage visited him at the polling site and offered a cup of coffee, speaking to him by name. Mr. Moscaritolo added that several of his relatives worked for the City and were supporters of Mr. Dunn. Mr. Moscaritolo conceded before the OAL that he had been offered reemployment with the City in his former title, but that he had not yet responded to the offer.

The appointing authority offered testimony before the OAL which established that there was a public outcry in Elizabeth with regard to a 1994 property tax increase. In response to the concerns of his constituents, Mayor Bollwage pledged to reduce the tax rate in 1995. In addition, Mayor Bollwage testified that State aid had been reduced during fiscal year 1994 from an anticipated 12.2 million dollars to 7.8 million dollars. In order to meet its fiscal objectives, and in light of the decrease in State aid, the City considered a number of options including: layoffs; restrictions in overtime; a salary freeze; elimination of health benefits for employee dependents; and an increase in various licensing fees, fines and assessments to generate additional revenue.

In anticipation of possible layoffs, Mayor Bollwage met with the City's Department Directors and asked each to prepare a list of employees whose positions could be eliminated. A master list consisting of all names submitted by the Department Directors was forwarded to the Business Administrator for consideration. Each Department Director who recommended an individual appellant's position for layoff testified that that position was eliminated because the duties of the position could be and were absorbed by employees remaining in the Department.

The City originally submitted a layoff plan to the Department of Personnel calling for 130 layoffs. That layoff plan was rescinded and a second plan was submitted to the Department of Personnel calling for 75 layoffs, affecting all departments. Subsequently, the Mayor instructed the Business Administrator to remove 50 names from the layoff list and approximately six or seven layoffs were avoided through attrition. The City ultimately laid off 19 employees. With the approval of the Mayor, nine of the 19 employees so affected were recalled to their former positions. Consequently, 10 City employees, including appellants, remained displaced due to layoff as of the date of the appeal.

Raphael Caprio, Professor of Public Administration at Rutgers University, testified on behalf of appellants as to the financial health of the City at the time of the layoff. Specifically, he indicated that, as of June 30, 1995, the City had a combined budget surplus of $9.8 million, up from $4.3 million two years prior. Moreover, Mr. Caprio noted that,

during the period from July 1, 1994 to June 30, 1995, the City had received $0.2 million in unanticipated revenues and had canceled $4.7 million in appropriations, thereby providing a windfall to the City of $4.9 million for inclusion in the budget surplus. Mr. Caprio also indicated that in 1995 the budget remained $453,862 under the State budget cap. Mr. Caprio concluded that the City had ample means to avoid the January 12, 1995 layoff and calculated a scenario with no layoffs.

Mr. Caprio, however, conceded the following: 1) his hypothesis did not reflect the appellants' actual salaries, but rather their salaries as listed in the City budget; 2) that his calculations were exclusive of health and fringe benefits; 3) that unanticipated revenues, by law, cannot be budgeted because of their variability; 4) that it would not be prudent for the City to use all of its utility surplus; and 5) that if his analysis had included the year 1992, the City's budget surplus would have decreased over a four year period.

Based on the above evidence, Administrative Law Judge Irene Jones (ALJ) found that appellants had failed to prove that their respective positions were eliminated in bad faith. The ALJ explained that a layoff action that is motivated by a bona fide desire or necessity to effect economy is presumed to be in good faith. The burden is on the employee to show to the contrary. The question on review is not whether a plan conceived and adopted for the purpose of saving money actually, in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following statutory procedures for removal.

The ALJ concluded that in order to prevail, appellants would have to produce evidence that at the time of the layoff, the appointing authority was aware that the layoff would not achieve economy or efficiency, adding that it is of no consequence that an appointing authority could have been less fiscally conservative in budget planning, could have raised taxes to meet shortfalls, or made a decision to shift monies from the budget in one area and not the other.

As to appellants' specific allegations of political retaliation, the ALJ found that appellants had failed to present actual or circumstantial evidence of same, adding that the only fact demonstrated by appellants was their prior affiliation with the former mayor, whose tenure spanned some 28 years. The ALJ noted that proof of political alignment with a prior administration, standing alone, is insufficient for the purpose of meeting the substantial burden of proving bad faith, adding that to accept a contrary rule would all but prohibit a newly-elected Mayor from implementing layoffs, given the substantial portion of employees who would likely have, in some way, been supportive or aligned with the new Mayor's predecessor.

Moreover, the ALJ found that even if the motive for the layoff of a particular employee is tainted by improper consideration, the layoff will be upheld where the position eliminated proves to be unnecessary, in that its abolition will not impair departmental efficiency. The ALJ concluded that in the present matter, as each Department Director who recommended an individual appellant's position for layoff testified that the appellant's position was eliminated because his or her job duties could be and were absorbed by employees remaining in his or her Department, those positions were eliminated for reasons of economy and efficiency. Thus, the ALJ concluded that appellants had been laid off in good faith and, accordingly, dismissed their respective appeals. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

Political Animus Established in Bad Faith Layoff Challenge

In the Matter of Richard Kirshbaum and Lisa Ruff

(Merit System Board, decided October 22, 1996)

Appellants, Richard Kirshbaum and Lisa Ruff, Data Processing Technicians, were laid off from their positions with the Camden County Sheriff's Office, effective April 21, 1995. Each appealed his or her layoff on the basis that it had been motivated by reasons other than economy or efficiency. Ms. Ruff failed to appear at the hearing before the Office of Administrative Law (OAL) and her appeal was dismissed accordingly.

Appellant Kirshbaum (hereafter "appellant") testified before the OAL that he was hired in February of 1992, by Sheriff William Simon, who was defeated by Michael W. McLaughlin in the November 1994 election for the position of Camden County Sheriff. Mr. McLaughlin took over the Sheriff's Office on January 2, 1995. Shortly thereafter, on January 24, 1995, Sheriff McLaughlin met with Sergeant Raymond Alkins, Personnel Officer for the Camden County Sheriff's Office, appellant, Lisa Ruff and Helen Patton, also a Data Processing Technician. Sheriff McLaughlin indicated at this meeting that appellant, Ms. Ruff and Ms. Patton would be laid off because: 1) the department had lost a one million dollar grant from the NJ Department of Community Affairs (DCA); 2) each was working out of title; and 3) each had been involved in political work while on the job.

On January 26, 1995, appellant sought the advice of his union shop steward. The shop steward indicated his understanding that appellant, Ms. Ruff and Ms. Patton had been targeted for layoff because they were friends of the former Sheriff and were perceived to be political appointees. Immediately following this meeting, appellant wrote a memorandum to Sheriff McLaughlin attempting to explain that he was neither politically active, nor affiliated with the former Sheriff. Appellant again wrote to Sheriff McLaughlin on January 28, 1995. Appellant's memoranda went unanswered.

During this period, appellant received a rating of "excellent" on his annual performance review; however, Sheriff McLaughlin refused to approve the evaluation. Due to Sheriff McLaughlin's refusal, appellant did not receive his annual merit increase. Appellant filed a grievance seeking the merit increase and was ultimately successful.

In February of 1995, Sergeant Alkins indicated to appellant that the Sheriff had decided to rescind his layoff. However, following the filing of the grievance, Sergeant Alkins informed appellant that the Sheriff had reconsidered his position, and now intended to proceed with the layoff as originally scheduled. Sergeant Alkins referred to the grievance filed by appellant during the latter conversation. On March 8, 1995, appellant was issued an official layoff notice. The layoff became effective on April 21, 1995. Appellant, Ms. Ruff and Ms. Patton were offered appointments in lieu of layoff to the title of Data Entry Clerk, at approximately one half their annual rate of pay. Both appellant and Ms. Ruff rejected the offer.

As to the alleged fiscal problems which necessitated appellant's layoff, Sergeant Alkins and Sheriff McLaughlin testified: 1) that the 1995 budget for the Sheriff's Office had been cut by $300,000 from the previous year; and 2) that payment had not been made to the Camden County Sheriff's Office of a grant in the amount of one million dollars, awarded in August 1994 by DCA. Sergeant Alkins and Sheriff McLaughlin searched for grants in order to make up the shortfall. The Sheriff also encouraged the utilization of an already existing furlough program. Ultimately, Sergeant Alkins and Sheriff McLaughlin determined that personnel cuts would be necessary and decided to eliminate the use of the Data Processing Technician title. Sergeant Alkins testified that this decision was based on a determination that the functions being performed by the Data Processing Technicians could readily be performed by others in the Sheriff's Office.

It was established before the OAL that the one million dollar grant from the DCA was intended to subsidize the cost of Sheriff's Officers; therefore, it should not have affected civilian employees. Moreover, the grant money was ultimately paid by the DCA to the Camden County Sheriff's Office. Sergeant Alkins also conceded that $200,000 of the $300,000 budget reduction in 1995 came about because the State had assumed the cost of Court Attendants. Additionally, Sergeant Alkins ac-

knowledged that the furlough program about which he spoke was a county-wide program and had not been initiated by the Sheriff.

Based on the above evidence, Administrative Law Judge Solomon A. Metzger (ALJ) found that appellant's layoff had been motivated by political animus, rather than for reasons of economy or efficiency. Specifically, the ALJ found that "when the dust settled" there was no million-dollar shortfall in the Sheriff's Office and the $200,000 initially cut from the Sheriff's budget did not have to be replaced, because it arose from a State takeover of Court Attendant salaries. Nevertheless, Sergeant Alkins and Sheriff McLaughlin maintained that it was necessary to lay off appellant, Ms. Ruff and Ms. Patton in order to bridge the remaining $100,000 gap. The ALJ was not convinced of this connection.

The ALJ accepted as fact that on January 24, 1995, Sheriff McLaughlin stated that appellant and his colleagues would be let go, in part, because of their political involvement. Moreover, the ALJ indicated that the evidence concerning the DCA grant was curious in that no document was produced from the DCA confirming that the grant had been withdrawn or that such withdrawal was threatened. Rather, the ALJ concluded that the potential loss of the DCA grant appeared to have been a convenient rationale for appellant's layoff. The ALJ also noted that Sheriff McLaughlin's explanation for failing to respond to appellant's memoranda of January 26 and January 28, 1995 and his explanation for refusing to approve appellant's February 1995 performance review were implausible. The ALJ concluded that neither economy nor efficiency, but rather, political animus was more likely than not the reason for appellant's layoff. Thus, he recommended that appellant be reinstated to the title of Data Processing Technician with back pay, benefits and counsel fees. Upon review, the Merit System Board affirmed this recommendation.

Bad Faith Challenge to Departmental Reorganization Denied

In the Matter of Steven Chiger and Edward O'Neil

(Merit System Board, decided December 3, 1996)

Appellants, Steven Chiger and Edward O'Neil, Supervisors with the Borough of Highlands Public Works Department, were demoted in lieu of layoff to the titles of Sewage Plant Operator and Equipment Operator, respectively. Each appealed the good faith of his layoff on the basis that it had been motivated by reasons other than economy or efficiency.

At the hearing before the Office of Administrative Law (OAL), Highlands Borough Councilman Robert Rauen testified that the reorganization of the Borough's Public Works Department had been a topic of discussion at Council meetings since early 1993. In November 1993, the Borough voters passed a referendum calling for the sale of the Borough's Water Utility (part of the Borough's Public Works Department) to a private entity. Concurrent with the sale of the Water Utility and, in part, as a consequence thereof, the Borough implemented its reorganization plan. Under that plan, the number of employees of the Public Works Department would remain unchanged at 14. However, whereas there had previously been three Supervisors directing the work of that Department, under the new plan, the three Supervisor positions would be eliminated in favor of a single Superintendent of Public Works. On July 27, 1994, the Council adopted an ordinance effectuating the reorganization of the Department of Public Works. That ordinance explicitly acknowledged the following as reasons for the reorganization: 1) the sale of the Water Utility; and 2) the desire of the Borough to centralize the supervisory function within the Public Works Department. Kenneth Daly, the Borough's Business Administrator, added that the use of a single Superintendent of Public Works would afford him a greater ability to shift employee assignments on a daily basis.

The Borough Council considered all Public Works employees, including the three existing

Supervisors, for the new Superintendent position. Kenneth Daly, the Borough's Business Administrator, was extended the courtesy of interviewing the Council's selection for Public Works Superintendent, as he and the new Superintendent would be working closely together; however, the ultimate decision as to who would fill the position remained with the Council. The Council narrowed the field of candidates to two individuals, Kevin Jasper, Equipment Operator, and Reggie Robinson, Supervisor. With the assistance of Mr. Daly, the Council ultimately selected Mr. Jasper as the new Superintendent of Public Works. After a brief period of service as Superintendent, Mr. Jasper voluntarily stepped down from that position and Reggie Robinson was appointed the new Superintendent of Public Works.

Steven Chiger testified before the OAL that as a result of the 1995 layoff, he was returned to his former title of Sewer Plant Operator, thereby suffering an $8,000 loss of income. He acknowledged that the appointment of Mr. Jasper to the new Superintendent position resulted in no increase in the number of personnel within the Public Works Department; however, he indicated that at the time of the demotion in lieu of layoff, he expected a $4,000 loss of income, rather than the $8,000 loss that he ultimately incurred.

Edward O'Neil testified that he and the former Mayor of the Borough of Highlands had had disagreements with regard to the management of the Public Works Department. Mr. O'Neil felt that these disagreements resulted in a "little retaliation" against him in the effectuation of the reorganization plan. Mr. O'Neil acknowledged that the elimination of the three Supervisor positions and the creation of a single Public Works Superintendent would increase the efficiency of the Borough's operation; however, he expressed his displeasure with the Borough's selection of Mr. Jasper and, later, Mr. Robinson, to fill the new Superintendent position. Specifically, Mr. O'Neil maintained that Mr. Jasper lacked "total knowledge regarding the job" and was incapable of making decisions on his own and Mr. Robinson lacked street savvy and was also indecisive. Mr. O'Neil testified that he did not believe the reorganization of the Public Works Department had saved the Borough any money; however, he provided no specific information regarding the amounts of money involved.

Administrative Law Judge John R. Futey (ALJ) indicated that in order to meet their burden of proof, appellants must establish by a preponderance of the evidence that at the time of the layoff the appointing authority was aware that the layoff would achieve neither economies nor efficiencies. The ALJ added that if there is no showing of bad faith, the fact that the reviewing agency or court would have chosen a different method of achieving the savings or that the appointing authority had other alternatives available is an insufficient basis for reversing the layoff.

Based upon the evidence presented, the ALJ found that the Borough's reorganization of its Department of Public Works, as described above, was designed for reasons of economy or efficiency. Specifically, he found that the elimination of three Supervisors in favor of one Superintendent of Public Works was an appropriate and necessary effort, under the circumstances, to increase the efficiency of the Department of Public Works. Moreover, the ALJ found that although appellants believed their respective demotions through layoff to have been motivated by bad faith, they provided no evidence thereof. Thus, the ALJ concluded that appellants had been laid off in good faith and, accordingly, dismissed their respective appeals. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

Time Limits of *N.J.S.A.* 40A:14-106a Applicable Only to County Police Officers

In the Matter of Michael Butler

(Merit System Board, decided Dec. 3, 1996)

The appointing authority, Monmouth County Sheriff's Office, brought concurrent charges against Michael Butler, a County Correction Officer, on the basis of two unrelated incidents. At a consolidated departmental hearing, the appointing authority imposed a 10-day suspension on the basis of both infractions without differentiating as to which portion of the suspension should be apportioned to which charge.

With regard to the first incident, the appointing authority charged the appellant with the following: 1) conduct unbecoming a County Correction Officer; 2) resisting supervisory authority; and 3) exhibiting an inappropriate attitude. The Administrative Law Judge (ALJ) sustained these charges, and the Merit System Board (MSB) concurred with that conclusion.

As to the second incident, the appointing authority charged the appellant with unauthorized absence and failure to comply with a correctional facility procedure regarding call-in time on the basis that appellant failed to report his anticipated absence from work until 20 minutes prior to his work shift. This action, the appointing authority asserted, was in direct contravention of established procedures which require an Officer to report any absence from work at least one hour prior to the start of the shift. The ALJ dismissed these charges on the basis that the appointing authority had failed to serve upon the appellant a Preliminary Notice of Disciplinary Action within 45 days from the date of the incident giving rise to the charges, in accordance with *N.J.S.A.* 40A:14-106a.

The MSB disagreed with the ALJ that *N.J.S.A.* 40A:14-106a applies in this case and also disagreed with the ALJ's consequent recommended reduction of the penalty from a 10-day suspension to an eight-day suspension. Specifically, the MSB observed that the express purpose of *N.J.S.A.* 40A:14-106 *et seq.*, is to enable the governing body of a county, adopting rules for the regulation of traffic upon the county highways and roads and for the enforcement of laws pertaining thereto, by ordinance or resolution, as appropriate, to create and establish "county police department(s) and force(s)" and to provide for the maintenance, regulation and control thereof. Thus, in interpreting the meaning of the Legislature's use of the term "law enforcement officer" at *N.J.S.A.* 40A:14-106a, the MSB adhered to the clear and unambiguous dictate of *N.J.S.A.* 40A:14-106, namely, that the enactment taken in its entirety, is intended to provide for the establishment and maintenance of county police departments for the express purpose of enforcing rules for the regulation of traffic upon the county highways and roads and not for the establishment and maintenance of county correction departments.

In support of this statutory interpretation, the MSB relied upon the well-established legal principle that the true meaning of an enactment and the intention of the Legislature in enacting it must be gained, not alone from the words used within the confines of the particular section involved, but from those words when read in connection with the entire enactment of which it is an integral part. *Petition of Sheffield Farms Co.*, 22 *N.J.* 548, 554 (1956); *See also Matter of Mut. Ben. Life Ins. Co.*, 258 *N.J. Super*. 356, 375 (App. Div. 1992), *Waterfront Com'n of N.Y. Harbor v. Mercedes-Benz*, 99 *N.J.* 402, 414 (1985); *Airwork Ser. Div., etc. v. Director, Div. Of Taxation*, 97 *N.J.* 290, 296 (1984); *Martin v. American Appliance*, 174 *N.J. Super*. 382, 384 (Law Div. 1980); *Loboda v. Clark Tp.*, 40 *N.J.* 424, 435 (1963); *Seatrain Lines, Inc. v. Medina*, 39 *N.J.* 222, 227 (1963); *Greggio v. Orange*, 69 *N.J. Super*. 453, 460 (Law Div. 1961); *Febbi v. Div. Of Employment Sec.*, 35, *N.J.* 601, 606 (1961); *Giles v. Gassert*, 23 *N.J.* 22, 33-34 (1956).

As supported by the Act's title (POLICE - COUNTIES) as well as its express purpose, namely, to provide for the creation, establishment and maintenance of county police departments, notwithstanding the Legislature's use of the ambiguous term, "law enforcement officer," the MSB found that the object and the nature of the subject matter, the contextual setting, and the statutes in *pari materia*, compelled its exclusion of County Correction Officers from coverage by the provisions of *N.J.S.A.* 40A:14-106a.

In light of the foregoing, and since it was undisputed that the appellant notified the appointing authority of his anticipated absence 20 minutes prior to the start of his scheduled work

shift, the MSB affirmed all charges against appellant, including those for unauthorized absence and failure to comply with correctional facility procedure regarding call-in time.

With regard to the application of the concept of progressive discipline, in accordance with the New Jersey Supreme Court holding in *West New York v. Bock*, 38 *N.J*. 500 (1962), the MSB noted that since the commencement of the appellant's employment at the jail, he had received the following: 1) verbal warnings for tardiness and refusing mandatory overtime; 2) a written warning for abuse of sick leave; 3) counseling and a written reprimand for failure to notify the department that he would be late for his shift; 4) a three-day suspension for excessive tardiness; 5) a five-day suspension for excessive tardiness and absence without leave; and 6) another five-day suspension for conduct unbecoming a public employee.

Based on the totality of the record, including the seriousness of the charges and the appellant's prior record, the MSB concluded that the penalty of a 10-day suspension was neither unduly harsh nor disproportionate to the offense. Thus, the MSB found that the action of the appointing authority in suspending the appellant for 10 days was justified. The MSB, therefore, affirmed that action and dismissed Mr. Butler's appeal.

HRDI Streamlines Services to State and Local Customers

By: Karen Toole, Director, HRDI

In order to provide training services to State, County and Local governments in the most efficient way possible, the Human Resource Development Institute (HRDI) has undergone a reorganization aimed at creating a learning government.

Shifting away from being a primary service provider, with instructors in the classroom, HRDI now focuses on cost-effective purchasing and innovative methods that stretch training dollars. Under the new system, HRDI has moved aggressively toward a new curriculum model that emphasizes management and leadership, customer service, diversity and technology.

Employees of government organizations can receive training based on their specific needs. HRDI now uses its expertise and experience to find the best and the most efficient way to provide this training not only to State agencies but also to county and municipal governments. HRDI coordinates and consolidates training efforts, using the size of State government as a bargaining chip to secure top quality training from the best providers at the most reasonable cost. In addition, HRDI continues to provide high quality management and leadership training, as well as other general interest courses, to government employees.

For example, HRDI's Spring Catalog, which includes listings of open enrollment courses from February 1, 1998 through June 30, 1998 offers nineteen Management and Leadership courses, nineteen Professional Development and Administrative Skills courses, twenty-one Human Resource Management courses and thirty-one Computer courses.

In addition, HRDI is expanding the way in which training is delivered from conventional classroom style to alternative technologies such as computer based and teleconferencing as well as cable television. HRDI is also partnering with Mercer County Community College and Rutgers University to offer additional programs of interest to government employees.

Governor Christine Todd Whitman describes training as "essential to the creation of a competent, diverse and productive workforce . . ." and a "benefit to all New Jerseyans by improving customer service and furthering the goals of the State." At HRDI, her words become reality every day.

FROM THE COURT

Following are recent Supreme Court and Appellate Division decisions in Merit System cases. As the Appellate Division opinions have not been approved for publication, their use is limited in accordance with *R.*1:36-3 of the N.J. Court Rules.

This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized.

Limited Review of Examination Materials for Reasons of Security and Confidentiality Upheld

James T. Brady v. Department of Personnel
149 *N.J.* 244 (1997)

In this appeal, the Court addresses the extent of access to test materials and grading scales given a civil-service candidate in the review of his test scores.

In October 1992, James Brady, who is currently a police sergeant in the Atlantic City Police Department, took a civil-service exam to attain the rank of captain. The exam was administered by the Department of Personnel ("DOP") and is designed to test a candidate's ability to respond to specific situations that may arise in the course of duty. The exam consists of both a written and oral part, both of which evaluate various categories of behavioral characteristic or "dimensions." Brady's overall score, although passing, reduced his relative eligibility for promotion.

Brady, who was unhappy with his overall score, appealed through the DOP's administrative channels. He was permitted to review a portion of his written test materials, including his answers, brief summaries of the questions, brief comments by the grader, and an explanation of the scoring process. He also received an audio tape of the oral component of his exam. Pursuant to its internal policy, however, the DOP had placed significant limitations on Brady's ability to review those materials. Specifically, Brady was allowed only one hour to review all the materials provided and could not copy any of the materials. He was not given access to the actual test questions or to the answer key, which identified several "possible courses of actions" ("PCAs") upon which the grading was based.

Based on his review of the materials, Brady wrote to the DOP Selection Appeals Unit, expressing his disagreement with his scores and requesting that the exam be regraded. Nine months later, a supervisor in the Selection Appeals Unit replied to Brady's request with an analysis of his score. In that analysis, the supervisor addressed the concerns that Brady had raised and broke down his score for each dimension. She further concluded that Brady's assigned scores were accurate and appropriate.

After expressing her conclusion, the supervisor informed Brady that he could appeal the decision to the Merit System Board ("the Board"), but that the Board would only consider the proofs, arguments and issues presented at the previous level of appeal. Apparently relying on that information, Brady appealed to the Board but did not advance any new arguments, including his belief that the supervisor erroneously had relied on information to which plaintiff had not been given access (i.e., the PCAs). The Board subsequently denied Brady's appeal, noting that he had provided no arguments, submissions or issues in support of his appeal, other than those raised and already considered in the appeal below.

Brady appealed the Board's determination to the Appellate Division, which ordered production of all test materials. The court based its decision on the need of both a court reviewing and a party challenging an administrative determination to have access to the record upon which the agency has

acted. The Appellate Division subsequently refused to stay its order, thus allowing Brady immediate access to the materials, subject to a protective order.

The Supreme Court granted the DOP's petition for review.

HELD: The DOP's provision for partial or limited access to Civil-service examination materials is a valid exercise of the agency's regulatory authority and represents a reasonable balance between its interest in the confidentiality of the exam process and an examinee's interest in reviewing the grading of examinations.

1. This case's technical mootness is not a bar to the Court's exercise of jurisdiction.

2. In keeping with the New Jersey Civil Service Act's general policy of encouraging employment that focuses on merit, the Act vests the DOP with the authority to devise a fair, secure, merit-based testing process by which candidates are selected for employment and promotion.

3. Brady's contention that he was entitled to greater access to his exam materials must be considered against the standard of review of whether the DOP's limitation of access was arbitrary, capricious, or unreasonable.

4. An agency decision may not be based on undisclosed evidence.

5. Courts may not routinely review the contents of civil-service examinations and answers and determine whether the questions were well or poorly answered, as such an inspection and review would involve a challenge to the substantive validity of the examination.

6. The DOP has not abused its discretion in deciding to recycle test questions or in making a determination to limit access to test materials in order to ensure confidentiality and security.

7. Given the general prohibition against judicial regrading of examination, full disclosure would confer little or no administrative or litigational benefit on the examinee.

8. To the extent that *Martin v. Educational Testing Service* suggests a requirement of full disclosure of civil-service examinations without regard to security and confidentiality concerns, it is overruled.

9. A candidate may be able to make a *prima facie* showing of arbitrariness or discrimination in grading that is so obvious and rises to such a high level that the full exam materials must be produced.

10. The supervisor's potentially erroneous statement that the Board would not consider new arguments was harmless and provides no basis for a reversal of the Board's denial of Brady's appeal.

Judgment of the Appellate Division is REVERSED.

JUSTICE STEIN filed a separate opinion, dissenting in part and concurring in part. Justice Stein did not disagree with the Court's determination that the Appellate Division erred in holding that all persons challenging their test scores must be provided with copies of the questions, their answers, and the grading standards. However, he believed that the Court's opinion tipped the balance too far toward the interests of confidentiality when it precluded disclosure of relevant test materials to the reviewing court and applicant, unless the applicant makes a *prima facie* showing that the test results are arbitrary. Rather, he believed that the Court could strike a more fair balance by requiring the DOP to furnish the reviewing court, in camera, with the complete materials to enable it to make a preliminary assessment of arbitrariness and determine whether further disclosure or other relief may be appropriate.

Layoff Rights Correctly Determined

Gertrude Remsen, Department of Human Services
A-1126-95T3 (App. Div., January 17, 1997)

After eighteen years of employment with the Department of Human Services, petitioner received a notice of layoff from her position as Program Assistant, Division of Developmental Disabilities (Program Assistant, DDD) at the Woodbridge Developmental Center. Petitioner was denied demotional layoff rights to two related positions and accepted, instead, a four-range demotion to Head Nurse at an annual salary loss of $9,000. She appeals the denial of her title rights appeal by the Commissioner of the Department of Personnel.

In the title rights appeal, petitioner claimed

she was improperly denied the right to change into either the position of Habilitation Plan Coordinator (HPC) or that of Principal Training Technician (PTT). The Commissioner found petitioner not entitled to switch down to HPC because the educational requirements were different and petitioner's experience was not similar to social work experience which was required for the position. In addition, the Commissioner found petitioner could neither bump into or transfer laterally to a PTT position, a title she formerly held before promotion to Program Assistant, DDD, because either the existing two PTT positions were vacant when petitioner was laid off, or they were abolished by an executive order placing all training positions in the Department of Personnel (dop). We affirm the Commissioner's decision.

I.

Petitioner maintains that because she satisfied the requirements for the Program Assistant, DDD title, a position that supervises HPCs, she is more than qualified to be an HPC. She asserts that four years of administrative experience in the operation of programs to treat the needs of developmentally disabled patients, required of a Program Assistant, DDD, is more than the equivalent of two years of general social work experience, a requirement to be a HPC. The Commissioner reviewed the title rights appeal on the merits, rather than looking only for a "clear material error." She disagreed with petitioner, determining that "[b]ased on a comparative analysis of the [DOP] job specification for the HPC title, and the Program Assistant, DDD title to which asserted rights are claimed, petitioner was seeking a change from a departmental planning and coordinating position to a hands on direct care service providing position for developmentally disabled clients." The Commissioner stated:

> [T]he requirement of program operation experience is not similar to social work experience since social work experience includes gathering and analyzing social information from clients, the determination of their needs, and the planning and administration of treatment plans geared toward the needs of individual clients. . . . This type of hands on experience is not evident in the Program Assistant job specification requirement. Moreover, the Program Assistant, DDD title performs duties such as coordination and review of work of other staff, delivery of training and program design, implementation and evaluation. *In contrast, the HPC title provides direct care services to developmentally disabled clients*. (emphasis added).

"A permanent State employee may be laid off for economy, efficiency or other related reason. The employee shall be demoted in lieu of layoff whenever possible." *N.J.S.A.* 11A:8-1. Demotional title rights may be pursued by the employee, in accordance with *N.J.A.C.* 4A:8-2.1(b), permitting her to displace the least senior employee at a selected job location "in the layoff unit holding a title determined to be lower than but related to the affected title of the employee." Specifically, under *N.J.A.C.* 4A:8-2.1(b)1-4, demotional title rights are determined pursuant to the following criteria:

> 1. The title(s) shall have lower but substantially related duties and responsibilities and, in State service, where applicable, a lower class code;
> 2. The education and experience requirements for the title(s) shall be similar and the mandatory requirements shall not exceed those of the affected title;
> 3. Special skills, licenses, certification or registration requirements shall be similar and not exceed those which are mandatory for the affected title; and
> 4. Any employee in the affected title with minimal training and orientation could perform the duties of the designated title by virtue of having qualified for the affected title.

Demotional rights may also be exercised to return to previously held permanent titles. *N.J.A.C.* 4A:8-2.2(f).

In *Gloucester County Welfare Board v. Civil Service Comm'n*, 93 *N.J.* 384 (1983), the Court determined that a State employee who applied for the position of Deputy Director of Welfare was unqualified for the position because she had only a

law degree instead of the necessary master's degree in either social work or business administration. The Court upheld the agency's refusal to broaden the educational qualifications for the position and determined the agency's action was not arbitrary or capricious. *Id.* at 399.

Here the Commissioner's decision was in accord with the Court's decision in *Gloucester County.* Moreover, an appellate court will not upset the ultimate determination of an agency unless shown that it was arbitrary, capricious or unreasonable, or that it violated legislative policies expressed or implied in the act governing the agency or that the findings on which the decision is based are not supported by the evidence. *Campbell v. Dep't of Civil Serv.*, 39 *N.J.*556, 562 (1963). *See Mazza v. Board of Trustees, Police and Firemen's Retm't Sys.*, 143 *N.J.*22, 25 (1995); *In Re Chief Clerk*, 282 *N.J. Super.* 530 (App. Div.), *certif. denied*, 142 *N.J.* 573 (1995). "[T]he agency's interpretation of the operative law is entitled to prevail, so long as it is not plainly unreasonable." *Metromedia, Inc. v. Div. of Taxation*, 97 *N.J.* 313, 327 (1984). It is, of course, well established doctrine that "[C]ourts are not free to substitute their judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable . . . ." *Gloucester County, supra*, 93 *N.J.* at 391 (citing *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562-63 (1978)).

N.J.A.C. 4A:8-2.1(b)4 does permit exercise of demotional rights when the affected employee could qualify "with minimal training and orientation," but when the experience is determined to be significantly dissimilar, clearly more than "minimal training and orientation" is necessary. Even if the petitioner were able to satisfy the fourth criterion with additional minimal training, because she lacked the requisite experience she failed to meet the other criteria, and as such, has no demotional rights to the HPC position. We conclude it was reasonable for the Commissioner to decide that petitioner does not have demotional rights to a HPC position because the job duties and experience requirements of Program Assistant, DDD and HPC are not sufficiently similar.

II.

Petitioner argues, in the alternative, that if she is not entitled to demotional rights as a HPC, her former permanent position as a PTT should have been restored. The record is unclear as to whether the PTT positions were abolished from the Department of Human Services and consolidated within the Department of Personnel, or whether the positions remain in the Department of Human Services but were vacated.

Whichever circumstance existed, however, it is clear that petitioner is not entitled to the PTT title. Petitioner claims that when initial seniority rosters were issued, two less senior employees were listed under the PTT title as well as under their unclassified status. However, an internal DOP memorandum dated October 14, 1994 specifically states that the classified positions [the PTT titles] of the two other employees were abolished. If the PTT positions were abolished, petitioner has no demotional right to one of them because *N.J.A.C.* 4A:8-2.1(b) permits demotional rights only to be exercised within the same unit; the Department of Human Services and the Department of Personnel are different units.

If, on the other hand, the positions were not abolished but remained vacant because the other two employees had been transferred to former unclassified positions, petitioner again is not entitled to the title because *N.J.A.C.* 4A:8-2.2 does not require the State to offer vacant positions to employees displaced in a layoff. That regulation provides the order in which title rights shall be provided against other employees; while lateral and demotional title rights may be provided from "[a] vacant position that the appointing authority has previously indicated it is *willing to fill*," (emphasis added) the State is not required to fill any vacancies. Either way, the Commissioner's decision is supported by the regulation and is not arbitrary, capricious, or unreasonable.

In sum, we conclude petitioner's contentions are clearly without merit. *R.2*:11-3(e)(1)(D) and (E).

Affirmed.

Denial of Male-Only BFOQ Designation Affirmed

In the Matter of Hospital Attendants, Hudson County
A-6071-95T1 (App. Div., July 14, 1997)

Hudson County (County) appeals from a final determination of the Merit System Board (MSB) which denied its motion for reconsideration of a prior decision of the Board which denied the County's petition to relax seniority based layoff rules for hospital attendants at Meadowview Psychiatric Facility (Meadowview).

On appeal, the County contends that: (1) the decision was not supported by the record evidence; (2) the decision was arbitrary and capricious because it was based on misinterpretations of the record evidence; (3) the finding that sex was not a bona fide occupational qualification (BFOQ) was contrary to law; and (4) the conclusion that the County's evidence was inadequate because it did not include empirical or case studies was contrary to law.

We have reviewed the record and concluded that these contentions are non-meritorious. We affirm.

Meadowview is a seventy-bed treatment center for extremely mentally impaired patients, most admitted involuntarily. On March 30, 1995, when layoffs of hospital attendants were imminent, County Director of Personnel Lawrence Henderson petitioned the Department of Personnel for relaxation of layoff, reemployment, seniority and other rules, in order to raise the proportion of male attendants. Fifty attendant positions were authorized, and of the fifty most senior attendants, only four were male. To serve patient privacy interests, the County sought to maintain a ratio of male to female attendants which would correspond to the ratio of male to female psychiatric unit patients, then 39/26, or 60% to 40%. The collective bargaining representative, District 1199J, opposed the request, contending that it was without rational basis and would constitute sex discrimination. On June 14, 1995, the Board denied the request, citing the lack of regulatory mandate; the lack of any BFOQ designation request to the Division of Equal Opportunity and Affirmative Action within the Department of Personnel; and the lack of evidence that sex matching between attendants and patients was essential.

On July 20, 1995, the County petitioned for reconsideration. It supported its petition with the certifications of Meadowview Administrator Joseph P. Verga, Clinical Director Peter A. Howland, M.D., and attendant David Achok, as well as numerous exhibits. District 1199J opposed the petition. Verga contended that a BFOQ was justified by the privacy rights of the male patients, the potential danger to female attendants from sexually preoccupied male patients, and the 1992 directive received from the Department of Human Services to increase the number of male attendants. According to Verga, as of July 1995, Meadowview had forty-four attendants -- nineteen male and twenty-five female. Without rule relaxation, thirteen male attendants would be displaced by thirteen females, resulting in a male-female attendant ratio of 6/38, or 13.6% to 86.4%, compared with a patient ratio of 39/23, or 63% to 37%.

The attendant's job was defined in the class specification as follows:

> Under direction of nursing staff, performs various patient care activities and related nonprofessional services necessary in caring for the personal needs and comfort of patients; does related work as required.

Examples of attendants' duties included bathing, dressing, undressing, giving alcohol rubs, taking temperature, pulse and respiration rates, measuring food intake and output, and giving enemas. According to Verga, the majority of attendants' work involved intimate patient contact. Based on the preferences of those male patients who communicated to them reliably, as well as the experience of Meadowview officials and legal privacy requirements, the ordinary practice was to match attendants to patients by sex. Optimal staffing would include seven to eight male attendants per eight-hour shift, one for every five male patients. Verga noted that male patients who preferred female attendants did so for improper reasons related to their psychiatric conditions, and that some female attendants feared sexual assault and had difficulty maintaining control and order when assigned to male patients.

The Board concluded that the County had

failed to present a factual basis for its privacy or safety concerns, and failed to establish that the designation of male only hospital attendants for male patients was reasonably necessary to the normal operation of Meadowview.

Under our standard of appellate review, a decision of an administrative agency will not be reversed unless it is arbitrary, capricious and unreasonable, or is unsupported by substantial credible evidence in the record as a whole. *Impey v. Board of Educ.*, 142 *N.J.* 388, 397 (1995) (citing *Dennery v. Board of Educ.*, 131 *N.J.* 626, 641 (1993)); *Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 587 (1988); *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980) (citing *Campbell v. Department of Civil Serv.*, 39 *N.J.* 556 (1963)). The standard is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs. *Charatan v. Board of Review*, 200 *N.J. Super.* 74, 79 (App. Div. 1985).

Our review of the record indicates that the findings of fact are supported by substantial evidence in the record and that the conclusions of law are supported by the case and statutory law cited in the final determination.

The following language from *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 *F.*2d 228, 236 (5th Cir. 1969), is still applicable:

> . . . What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.
>
> . . . Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

As the New Jersey Supreme Court stated:

> [The] amendment [to the New Jersey Civil Rights Statute] was the result of a growing consciousness across the country, significantly represented by the anti-sex discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e--2 and 3, that females were and are pervasively discriminated against in American society in respect of employment and promotional opportunities, with consequences not solely of injustice on an individual basis but also of injury to the national welfare in terms of the most advantageous deployment of available skills and talents in the professional and general work force.
>
> [*Passaic Daily News v. Blair*, 63 *N.J.* 474, 483 (1973).]

The MSB found:

> In the case presently before the Merit System Board, Hudson County offers no factual basis in support of its belief that a male-only BFOQ is necessary to safeguard the privacy interests of its male patients at Meadowview Psychiatric Facility. Rather, Hudson County presents primarily a list of tasks performed by a Hospital Attendant with regard to both male and female patients along with the unsupported beliefs of Mr. Verga and Dr. Howland that the performance of such tasks by female Hospital Attendants relative to male psychiatric patients will result in a loss of privacy to those male patients. The County submits not a single statement from either a male patient or a family member of a male patient indicating an objection to the provision of intimate care by female Hospital Attendants. In fact, it is again worth noting, Mr. Verga states in his certification that many male patients actually prefer receiving care from female Hospital Attendants. By comparison, the defendant in *Fesel* presented extensive factual support for its BFOQ defense, namely, affidavits from

nine female guests which indicated those guests' strenuous objection to the employment by the Home of male nurse's aides, and those guests' intention to leave the Home if required to accept intimate care from male nurse's aides; testimony from children of female guests of the Home to the effect that they would remove their parents from the Home if male nurse's aides were employed to perform intimate care of their female parents; and testimony from eight female guests at the Home that they would not consent to the presence of a male nurse's aide at the Home and would object to being cared for by a male.

The final determination of the MSB which denied the motion of Hudson County for reconsideration of its prior decision to deny relaxation of the seniority based layoff rules for hospital attendants at Meadowview is affirmed for the reasons set forth in the well-written, well-reasoned decision of the MSB.

Affirmed.

Medical Disqualification of Sheriff's Officer Candidate Affirmed

In the Matter of Alan Morris, Sheriff's Officer, Middlesex County

A-6352-94Tl (App. Div., July 19, 1996)

The Merit System Board of the Department of Personnel ("Board") removed appellant from the Civil Service List for Sheriff's Officer in Middlesex County. The Board found him medically unfit to perform effectively the duties of the position. He appeals. He contends that there is no evidence in the record that his physical condition would prevent him from performing the duties of the position, and that the Medical Examiner's Panel ("Panel") and the Board ignored evidence that his physical condition would not impact on his ability to perform his duties. After a thorough review of the record and the arguments presented, we affirm the Board's decision.

I.

The Panel found that the appellant had a heart irregularity, namely a "ventricular ectopy and premature ventricular contractions even at rest."

Appellant maintains that, as part of the screening process required by the Department of Personnel, he underwent a battery of medical examinations including a stress test. A county appointed physician, Dr. Hip-Flores, terminated the stress test after six minutes and forty-four seconds on the ground that appellant developed extra heartbeats, a ventricular ectopy, during the exercise. Dr. Hip-Flores failed him on this part of the exam.

According to appellant, two days later he went to another physician, Dr. Mattina, a practicing cardiologist who is Board Certified in the area of internal medicine. Dr. Mattina performed a complete cardiovascular examination which included a ten minute stress test. Dr. Mattina noticed the extra heartbeats which had developed during the initial examination but did not believe that the condition was significant. Appellant maintains that, "[e]ssentially, Dr. Mattina found . . . appellant was physically fit to perform the job of Sheriff's Officer, despite the existence of the ventricular ectopy."

Appellant also saw Dr. Hazley, a Board Certified Internist, who, appellant contends, fully concurred with Dr. Mattina's assessment. Appellant maintains that he submitted additional evidence to the Board "tending to prove that extra heartbeats are not considered abnormal because they occur quite commonly."

Appellant says that he is active and energetic. He runs forty-five minutes per day on a treadmill, scuba dives and is learning karate. He maintains that he takes no medication except for vitamins, has never smoked and does not drink alcohol. He states that at work he is often required to lift packages weighing up to seventy pounds. He contends that "the Panel and the Board have failed

to articulate any correlation between [a]ppellant's physical condition and his ability to perform the work . . . of [a Sheriff's Officer]."

Appellant relies on *Matter of Vey*, 124 *N.J.* 534 (1991), and a later decision in the same case, *Matter of Vey*, 135 *N.J.* 306 (1994). The Court in these opinions said that the Board should articulate a correlation between the appellant's medical condition and his fitness for the position. The Supreme Court in the first *Vey* case remanded for the Board to articulate that correlation. *See Matter of Vey*, *supra*, 124 *N.J.* at 544. In the second opinion, the Supreme Court found that the Board on remand had sufficiently done so and affirmed the Board's decision. *See Matter of Vey*, *supra*, 135 *N.J.* at 308.

II.

The Board acted carefully and responsibly in this case. The Board requested a recommendation from its Medical Panel, composed of medical professionals who are faculty and practitioners at the New Jersey University of Medicine and Dentistry. The Panel evaluated the medical reports submitted by the parties and held a hearing. The Panel stated in its report:

> *Impression*: Mr. Alan Morris is a pleasant individual with a significant problem of morbid obesity. His height of 6 foot 0 inches and weight of three hundred fifteen pounds is in accord with this. The major problem however, is the ventricular ectopy that was detected on both stress tests. Dr. Mattina went to great length to state that he found no evidence of organic or structural heart disease and he found no evidence on stress testing or other examination to support a diagnosis of cardiac ischemia. There is no doubt however, about the presence of ventricular ectopy and premature ventricular contractions even at rest.
>
> *Conclusion:* Based on the evaluation of all materials given to the Medical Examiners Panel and the consultants review it is the opinion of the Medical Examiners Panel that there is reason to remove Mr. Alan Morris from the list of eligible candidates for sheriffs officer for Middlesex County.
>
> *Recommendation:* The Medical Examiners Panel recommend that Mr. Alan Morris not be returned to the list for sheriff's officer for Middlesex County.

The Board reviewed the Panel's report and the exceptions and materials filed by the appellant. The Board accepted the Panel's report and decided that the appellant should be removed from the list.

We have a limited role in reviewing a decision of an administrative agency. The agency decision will only be reversed if it is arbitrary, capricious or unreasonable or not supported by substantial credible evidence in the record as a whole. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-580 (1980).

The Board's decision in this case was not arbitrary, capricious or unreasonable. Special care must be taken in considering persons for law enforcement positions. A Sheriff's Officer is a law enforcement officer. *N.J.S.A.* 43:15A-97. *See also State v. Winne*, 12 *N.J.* 152, 167-168 (1953) (although the prosecutor is primarily responsible for law enforcement in the county, the Sheriff "possesses by the common law broad powers of law enforcement in his county"). A Sheriff's Officer is empowered by statute to act as an officer "for the detection, apprehension, arrest and conviction of offenders against the law." *N.J.S.A.* 2A:154-3. Sheriff's Officers may carry firearms. *N.J.S.A.* 2C:39-6(c)(4).

The Sheriff also must provide security for the Law and Chancery Divisions of the Superior Court, *see N.J.S.A.* 2B:6-1, a challenging and sensitive task in today's volatile environment. To paraphrase *Matter of Vey*, *supra*, 135 *N.J.* at 308, the work of a Sheriff's Officer is not "just another job" and "some people should not serve" as Sheriff's Officers.

We recognize that the Board did not clearly articulate a correlation between the appellant's physical condition and the requirements of the position. *See Matter of Vey*, *supra*, 135 *N.J.* at 307, and *Matter of Vey*, *supra*, 124 *N.J.* at 538-544. In the *Vey* cases the question was whether psychological traits, a somewhat amorphous concept, should disqualify the applicant. Here, the need for articulation of the correlation is not as great because we are dealing with concrete considerations; the physical condition of the applicant.

We commend the appellant for his determination to become a Sheriff's Officer. However, we find reasonable and certainly not arbitrary or capricious the Board's decision based on its Medical Panel's recommendation that a three hundred fifteen pound person, with a heart irregularity, does not meet the rigorous standards for a Sheriff's Officer.

Affirmed.

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